Filed 4/26/12 P. v. Shirley CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LILLIAN ANNETTE SHIRLEY, Defendant and Appellant.	F061929 (Super. Ct. No. 10CM8883) **O P I N I O N**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kings County. Thomas DeSantos, Judge.

Meredith J. Watts, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Wanda Hill Rouzan, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

[*] Before Wiseman, Acting P.J., Dawson, J., and Franson, J.

Appellant, Lillian Annette Shirley, pled guilty to knowingly and unlawfully bringing a controlled substance, viz., Vicodin, into a state prison (Pen. Code, § 4573; count 1), and unlawful and knowing possession of Vicodin in a state prison (Pen. Code, § 4573.6; count 2). The court imposed a prison term of two years.

On appeal, appellant contends the court abused its discretion in imposing a prison sentence rather than granting probation. We vacate the sentence and remand for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

Facts[1]

On October 9, 2010, a correctional officer at Avenal State Prison observed, by means of "video surveillance," inmate Jimmie Monk "retrieve an object" from appellant and place it underneath his wheelchair cushion. The officer "responded to [Monk's] area," conducted a search of the wheelchair, and found, underneath the seat cushion, a cellophane package containing 27 and one-half Vicodin pills.

Appellant told the officer that she brought the pills into the prison, hiding them in her bra.

Probation Officer's Findings and Recommendation

In the section of the RPO discussing the "Criteria affecting probation" under California Rules of Court, rule 4.414,[2] the probation officer states the following: the "nature, seriousness and circumstances of the offense are no more serious when compared to other instances of the same offense"; appellant "was an active participant, in

---

1 Our factual summary is taken from the report of the probation officer (RPO).

2 All rule references are to the California Rules of Court. The initial paragraph of rule 4.414 states: "Criteria affecting the decision to grant or deny probation include facts relating to the crime and facts relating to the defendant." The remainder of the rule sets forth a list of such facts. The list is non-exhaustive. (Rule 4.408(a).)

that she smuggled vicodin pills into State Prison and passed them to an inmate"; the "manner in which the crime was carried out did not demonstrate criminal sophistication or professionalism on the part of the defendant"; appellant has no criminal record; she had never been on probation previously; appellant "stated she is willing to comply with all terms and conditions of probation"; the "likely [effect] of imprisonment on the defendant is no more substantial than any other individual who is not familiar with [prison]"; appellant "will suffer significant collateral consequences as a result of the present felony convictions" in that if she is convicted of a felony in the future, the instant convictions will render her presumptively ineligible for probation under Penal Code section 1203, subdivision (e)(4); "it did appear [appellant] was remorseful and took responsibility for her actions"; and the circumstances of the instant offenses and appellant's lack of criminal history indicate that "it does not appear [appellant] would pose a danger to society if not imprisoned."

The RPO lists one circumstance in aggravation: "The manner in which the crime was carried out indicates planning, sophistication, or professionalism." As circumstances in mitigation, the RPO again notes that appellant has no record of criminal conduct and that she "voluntarily acknowledged wrongdoing prior to arrest or at an early stage of the criminal process."

The probation officer recommended that appellant be granted probation.

Appellant's Statements[3]

Appellant met Jimmie Monk in 2007 when he was hospitalized for injuries he suffered after being struck by a car and she was his social worker. She maintained contact with Monk after he was discharged and the two eventually developed a romantic

---

3 Information in this section is taken from letters appellant wrote to the court, her statement in mitigation filed with the court, and her statements to the probation officer as reported in the RPO.

relationship. At the time of the instant offenses, she had been visiting Monk in prison on a regular basis for more than one and one-half years.

In October 2010, Monk was in severe pain from his injuries and he was not receiving any pain medication. He had been prescribed Vicodin when he was out of prison, but in prison he was given Tylenol 3, and in early 2010, his pain medication was discontinued.

In September 2010, while organizing some of Monk's belongings in his garage, appellant found some of Monk's prescription Vicodin. Initially, appellant indicated that she did not tell Monk she had found his Vicodin and she brought it to him, wanting to surprise him. However, in a letter written after she was sentenced, she stated she told Monk of her find, and he asked her to bring the Vicodin to him, along with some tobacco. On the day of her arrest, appellant also smuggled to Monk tobacco, lighters and rolling papers.

Appellant told the probation officer she "felt sorry for [Monk]," she "didn't like seeing him in pain," and in bringing Vicodin into the prison, she "was only trying to help a friend who was in physical pain."

Additional Background

Prison records indicate that Monk was not receiving pain medication at the time of the instant offense, but on October 22, 2010, 13 days after the instant offense, he was prescribed, and began receiving, Tylenol 3.

Sentencing

The court noted the following: Appellant "pled guilty right out of the gate," and thus, "[i]t truly is an early plea"; appellant "truly probably is remorseful" and she "does not have any criminal record to speak of." The court stated, "The Court has considered all those facts."

Later, the court stated, "And for that amount, 27 and a half pills, that's a large, large amount." And subsequently, in denying probation, the court stated: "The amount of drugs, 27 and a half pills of Vicodin, is considered a large amount.... [¶] Based on the amount of drugs being brought into the prison and looking at Rule 4.414, again, one of the first factors is the nature, seriousness and circumstances of the crime as compared to other instances of the same crime. [¶] The Court in this matter believes that the crime itself in this far outweighs all the other factors that the defendant has in her favor as set forth by Mr. Gomez [defense counsel] in his Statement in Mitigation and in the [RPO]. It's only necessary for the Court to believe one factor to make a determination as to whether or not probation is appropriate. [¶] Based on this facts [*sic*] that I've seen, the amount of drugs, I find that this is not a probation case and I decline to follow the recommendation of probation."

DISCUSSION

As indicated above, appellant contends the court abused its discretion in imposing a prison sentence rather than granting probation.

Governing Legal Principles

All defendants are eligible for probation unless a statute provides otherwise. (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282 (*Aubrey*).) The decision to grant or deny probation requires consideration of all the facts and circumstances of the case." (*People v. Birmingham* (1990) 217 Cal.App.3d 180, 185.) "Relevant criteria enumerated in [the rules of court] ... will be deemed to have been considered unless the record affirmatively reflects otherwise." (Rule 4.409.)

In determining whether to grant or deny probation, "Sentencing courts have wide discretion in weighing aggravating and mitigating factors [citation], and may balance them against each other in qualitative as well as quantitative terms." (*People v. Roe* (1983) 148 Cal.App.3d 112, 119.) "California courts have long held that a single factor

in aggravation is sufficient to justify a sentencing choice...." (*People v. Brown* (2000) 83 Cal.App.4th 1037, 1043.) For example, in *People v. Osband* (1996) 13 Cal.4th 622, the court stated that "a single factor in aggravation suffices to support an upper term." (*Id*. at p. 730.) "The circumstances utilized by the trial court to support its sentencing choice need only be established by a preponderance of the evidence." (*People v. Leung* (1992) 5 Cal.App.4th 482, 506.)

"The grant or denial of probation is within the trial court's discretion and the defendant bears a heavy burden when attempting to show an abuse of that discretion." (*Aubrey, supra,* 65 Cal.App.4th at p. 282.) Nonetheless, "all exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue." (*People v. Russel* (1968) 69 Cal.2d 187, 195, disapproved on another point in *People v. Anderson* (2001) 25 Cal.4th 543, 575.) "The trial court's sentencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.'" (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.)

Analysis

The criteria set forth in rule 4.414 that can have a bearing on a court's decision to grant or deny probation include the following: "The nature, seriousness, and circumstances of the crime as compared to other instances *of the same crime*." (Rule 4.414(a)(1), italics added.) As indicated above, the trial court, relying solely on this factor, denied probation based on its finding that the instant offenses involved a "large amount" of Vicodin.

However, there is nothing in the record to support this finding. The record tells us nothing of "other instances of the same crime[s]" (rule 4.414(a)(1)—bringing Vicodin into a prison and possession of Vicodin in prison, and it is not self-evident that 27 and

one-half pills is a comparatively large amount of contraband. Therefore, there is nothing in the record upon which to base a comparison of the instant offenses and other instances of the same offense. We do not say that a full evidentiary hearing is required to determine the question, but in order to conduct meaningful appellate review of a finding, there must be some support in the record supporting the finding. Here, there is none. Thus, there is no evidence supporting the only factor relied upon by the court to deny probation.

In addition, we doubt that this is the typical "drug mule" case. The record indicates the following: The Vicodin appellant brought to the prison was Monk's, appellant having found it in his house; it had been prescribed for him by a physician for relief of pain; he was not receiving any pain medication at the time appellant brought him the Vicodin; and less than two weeks later, prison medical authorities prescribed and supplied him with pain medication, indicating that his need for such medication was genuine. Moreover, appellant's record reflects only a single speeding ticket; the present case represents her one and only encounter with the criminal justice system. On these unique facts, given the absence of any evidentiary support for the sole basis for the court's denial of probation, we conclude that this is the rare case where an abuse of sentencing discretion has been shown. Accordingly, the sentence must be vacated and the matter remanded for resentencing.

DISPOSITION

The sentence is vacated and the matter remanded to the trial court for resentencing. In all other respects, the judgment is affirmed.